No. 5374.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of
A. G. JOHNS,
Trustee in Bankruptcy of E. Y. Foley, Inc., a corporation, a Bankrupt,
and also
Trustee in Bankruptcy of E. Y. Foley, a Bankrupt,
Plaintiffs-Appellees,

Pacific Southwest Trust and Savings Bank, a corporation et al.,
Defendants-Appellees,
and
F. M. Withers and C. H. Withers, composed of a partnership of Withers Brothers,
Defendants in Intervention, Appellants.

APPELLANT'S BRIEF.

I. HENRY HARRIS,
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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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APPELLANT'S BRIEF.

The appeal is from a ruling denying appellant permission to intervene in the above entitled case.

STATEMENT.

An action was instituted by A. G. Johns, the trustee in bankruptcy of the Estate of E. Y. Foley, Inc., and also trustee in bankruptcy of the Estate of E. Y. Foley v. the Pacific Southwest Trust and Savings Bank #B-121M, Equity, which resulted in a judgment in favor of the trustee and against the bank, and also in favor of A. B. Tarpey and C. D. Pruner, said Tarpey and Pruner having intervened prior to the trial of the action, upon appeal judgment of the District Court was reversed. (See White, Trustee, v. Pacific Southwest Trust and Savings Bank, *et al.,* 15 Fed. 2nd, 300.) The judgment, however, in favor of the intervenors was affirmed. Subsequent to the reversal and affirmance a motion came on for the interpretation and construction of the mandate of the Circuit Court of Appeals, at which time F. H. Wilson, N. D. Hopper and John G. Carew were granted permission to intervene, a few weeks after the said Wilson applied for permission to intervene the appellants also moved to intervene, but their application was denied.

While the application by the appellants to intervene was pending and on or about November 10th, 1927, a meeting of the creditors of E. Y. Foley and E. Y. Foley, Inc., was held before the referee in Fresno. At that meeting there was present Mr. F. M. Withers, one of the petitioners; it was there determined to settle and adjust the controversy and dispose of the funds, in the disposition of which fund these appellants by their application for permission to intervene sought participation. Its division was decided upon. [Tr. pp. 41 to 52.] Under the terms of settlement and adjustment appellants received nothing, subsequently and on December 3rd,

1927, a proposed agreement, a proposed stipulation and a proposed decree setting forth the manner in which the fund was to be distributed, giving the names of the persons, the amount each one was to receive, was in the United States District Court, Honorable Paul J. MacCormack presiding, presented for approval and entry. The appellants had not signed the proposed stipulation or proposed agreement and neither of their names appear in the proposed decree. Counsel for Withers Brothers, the applicants, was present in the court room on December 3rd, 1927, during the proceedings [Tr. pp. 35, 36 and 37], and stated that he desired to be heard, and objected to the proceedings and to the consideration of or the entry of the proposed decree. The Court called two witnesses, who upon examination testified that they were present at the meeting in Fresno, November 9th, 1927, and that there was no objection to the proposed agreement, and that no one voted disapproval of the agreement and that counsel for the petitioners was not present at the meeting.

The court then stated that it did not recognize counsel for the petitioners as regularly appearing herein or having any right to appear herein on behalf of himself or any party to this action, and the court further stated, that it appearing to the court that no creditor had objected to the entry of the proposed decree herein or the confirmation and approval of the proposed agreement and proposed stipulation herein filed on November 10th, 1927, and it appearing that all of the creditors of the consolidated bankrupt estates of E. Y. Foley and E. Y. Foley had approved said stipulation, proposed agreement and proposed decree, the motion was granted and the

court thereupon signed and ordered entered herein the proposed decree.

Facts.

Mr. E. Y. Foley, in 1923, was insolvent. A certain number of his largest creditors, in an attempt to save the business from being sold at a forced sale and in order to continue it as a going enterprise, contributed the sum of $200,000 under three certain agreements; one executed in January, 1923, termed the trust agreement; one on February 19, 1923, termed a creditors' contract; and another on March 14, 1923, also termed a creditors' contract. [Tr. p. 42.]

Succinctly stated, some 13 creditors of E. Y. Foley first subscribed $200,000 and subsequently paid that sum over to E. Y. Foley, Inc., the corporation, which took over the business and assets of E. Y. Foley, as trustee for the purpose of paying grower creditors 25% of their claims and to pay those debts which were pressing debts of E. Y. Foley, payment of which could not be deferred, see Exhibit B in the main case herein [Tr. book 1, p. 55] which reads in part as follows:

"It is understood, and this agreement is made upon the express consideration and condition, that the agreement above provided for between said Foley and said trustees and the creditors of said Foley shall be executed and become effective and the obligations of the signers hereto to make the advances herein provided for shall not accrue unless and until said agreement does become effective and unless the said trustees shall determine that the amount to be advanced will be sufficient TO PAY OFF SUCH PRESSING DEBTS OF SAID FOLEY AS CANNOT BE DEFERRED and likewise provide a fund which in the judg-

ment of the trustees may be sufficient to carry on the business as a going concern until such time as the assets of said Foley can be realized upon in an amount sufficient to pay off all existing debts of said Foley, not exceeding, however, one year from the effective date of said agreement."

Said trust agreement was executed in February, 1923, subsequently the corporation or the directors of the corporation was substituted as trustees for Messrs. Lynes, Sutherland and Say.

On August 3rd, 1923, the petitioners had a judgment against E. Y. Foley for the sum of $10440.15 rendered in the Superior Court of the state of California in and for the county of Fresno #30471. At the same time they were entitled to a judgment for $27,283.40, recovered in the Superior Court of the state of California in and for the county of Fresno #29900, which judgment was not entered, however, until September 13, 1923. On this said date, August 3, 1923, appellants entered into agreement with E. Y. Foley, Inc., whereby E. Y. Foley, Inc. and its directors, agreed to pay defendants the sum of $21,500.00 out of E. Y. Foley, Inc., special "A" account, which $21,500 amount was evidenced by a promissory note dated August 3, 1923, signed by the corporate name and its president and secretary. The note was not honored at maturity. On September 13, 1923, at the instance of friendly creditors petitions in involuntary bankruptcy were filed against E. Y. Foley, and also against E. Y. Foley, Inc. E. Y. Foley and E. Y. Foley, Inc., without opposition were subsequently adjudged bankrupts.

The Pacific Southwest Trust and Savings Bank with whom special "A" account was on deposit claimed same as an offset to claims held by E. Y. Foley and E. Y. Foley, Inc., against it, thereupon trustee in bankruptcy of E. Y. Foley and of E. Y. Foley, Inc., instituted this action to recover the residue of the trust fund on deposit, amounting to $57,637.72. [Tr. p. 45.]

Messrs. A. B. Tarpey and C. B. Pruner, intervened prior to the trial. The U. S. District Court rendered judgment in favor of the trustee and against the Pacific Southwest Trust and Savings Bank on certain issues and decreed that the trust fund special "A" account should be distributed between the creditors who had contributed the money after the intervenor Tarpey and intervenor Pruner, grower creditors, should receive certain sums claimed by them out of the said trust fund.

As before shown the Circuit Court of Appeals reversed the District Court in all matters, save that it affirmed the disposition of part of the trust fund. White v. Pacific Southwest Trust & Savings Bank, *et al.,* 9 Fed. 2nd 650; 15 Fed. 2nd 300.

The mandate of U. S. Circuit Court was dated November 1st, 1926. On or about June 6th, 1927, T. H. Wilson prayed for leave to intervene, the application was granted on August 6th, 1927, the complaint of the said Wilson was filed on August 6th, 1927. B. M. Hopper and J. G. Carew also made application to intervene about the same time as F. H. Wilson, and their application was also granted. [Tr. pp. 25 to 31.]

Appellant herein filed application on June 29, 1927, and noticed same for hearing for July 11, 1927, the application was opposed by the Trustee, the bank and

others, and the Learned District Court on November 9th, 1927, denied the application of the appellant to intervene. [Tr. p. 34.]

POINT ONE.

The Learned District Court Erred in Denying the Application.

The complaint in intervention shows

(a) That the parties in the action, wherein the petitioners seek to intervene all claim and assert interest adverse to the petitioners in a certain fund designated special account "A," and seek an adjudication of the rights of plaintiff and defendants without regard to the rights of the petitioners.

(b) That such adjudication would result in depriving the appellants of a definite interest in such fund and provoke a multiplicity of suits.

(c) That in May, 1923, appellants recovered a judgment for $10,440.15, in the Superior Court of the state of California in and for the county of Fresno, and on September 13, 1923, recovered a judgment for $27,-283.40 in the same court.

(d) That on or about the 3rd day of August, 1923, the appellants entered into an agreement with E. Y. Foley, Inc., as trustee of said fund, wherein E. Y. Foley agreed to pay to the petitioners $21,500.00, out of special fund "A" on September 3rd, 1923, upon the ground that the judgments were "pressing debts of said Foley, the payment of which could not be deferred." The balance of said judgments and all other obligations were to be satisfied and discharged by the delivery, or agreement to deliver, certain preferred stock of E. Y. Foley, Inc.

(e) That the appellants were at all times ready, willing and able to carry out the terms and conditions of the agreement on their part to be performed.

(f) That on August 3rd, 1923, a resolution was passed by the board of directors of E. Y. Foley, Inc., the trustees of said fund, guaranteeing to pay said $21,500.00 and the president and secretary were empowered to execute and deliver all instruments necessary.

(g) That a note for $21,500.00 was thereupon executed to the order of the appellants. That said note was presented at maturity and payment was refused, although special account "A" at the time had sufficient funds with which to pay the note.

(h) That the appellants are the equitable assignees of a portion of said special account "A," *i. e.,* $21,500, thereof with interest from September 3rd, 1923, same being "a pressing debt" of E. Y. Foley, that the payment of which could not be deferred."

(i) The note was presented to the Pacific Southwest Trust and Savings Bank, where the fund was on deposit, but was not paid out of said fund. That said bank wrongfully withheld payment thereof and the note has not been paid.

(j) That said fund, special account "A," was and is a fund created and deposited with the Pacific Southwest Trust and Savings Bank, for the purpose of paying said appellants and others as appears by the judgment entered herein on February 16, 1923.

White v. Pacific Southwest Bank, 9 Fed. 2d. 630.

(k) That the claims of the plaintiffs and other defendants are subordinate to that of the appellants.

(1) That the status of plaintiffs and defendants herein and of the appellants and other creditors of E. Y. Foley and E. Y. Foley, Inc., with respect to their interest in special account "A" has been in litigation for three years and more last past, until the refusal of the United States Supreme Court to review the decree of the United States Circuit Court of Appeals to which the judgment of the last named court was referred upon appeal.

The appellants could not by reason of such controversy determine what legal, and/or what equitable course to pursue and in order to avoid a multiplicity of actions and/or protect their interest, and/or claims upon said fund.

(m) That the issues in the action cannot be properly or equitably determined without reference to and determination of the right of the appellants.

(n) That the said claims were filed with the referee. That the usual relief was sought. That the trust was sustained by the Learned District Court, and also by this High Tribunal.

White v. Pacific Southwest Trust & Savings Bank,
9 Fed. 2d. 650, sec. 15 Fed. 2d. 300.

That part of the trust agreement pertinent to the issues herein has been heretofore set forth.

That the complaint sets forth a perfect cause of action upon a promissory note does not admit of argument. The question presented is, does the complaint in intervention show facts sufficient to constitute an equitable assignment entitling the petitioners to intervene?

The Learned District Court holds that no facts alleged in the complaint in intervention were sufficient

to constitute an equitable assignment or lien upon the fund.

In this we believe the Learned District Court erred, assuming the allegations of the complaint in intervention to be true, as for the purpose of this appeal the court must, the fact that the appellants waived certain rights under the judgment or judgments was a good and valuable consideration, which authorized the trustee of the fund to pay appellants $21,500.00 out of that trust fund; whether that agreement be in writing or in parol and whether the fund was in existence at the time of the contract, or only came into existence subsequent thereto, was immaterial.

On August 3, 1923, when the agreement was entered into that these petitioners were in a position to demand the entire $38,000.00 is hardly debatable. Their executions were to be issued upon the asking. A business valued at $2,500,000.00 was involved, and unless the assets of E. Y. Foley could be used in a going concern, the loss to the creditors would have been tremendous, and but a small percentage of the face of their claims against Foley would have been collectible. The only chance for these creditors holding claims aggregating in excess of $2,500,000.00 to realize upon these claims was the continuation of the business of many years' standing. The petitioners, armed with judgments, were not unmindful that if they wished to press their claims they would instanter be paid dollar for dollar. They did not press their full vantage, but they did insist upon $21,500.00, the amount they had deposited as security with Foley and received nothing for. Whether or no they were in financial distress from the loss of this

$21,500.00 is immaterial. $38,000.00 is no inconsiderable amount to the ordinary merchant, kindly-hearted and with a desire to aid their fellow merchants, they agreed to permit the business to go on; to refrain from all attempts to attach the assets for one month, at which time they were to receive $21,500.00; their deposit for the balance they generously and unselfishly agreed to wait.

To revert to a time prior to this equitable assignment. On January 26th, 1923, February 19th, 1923, and March 14, 1923, certain creditors of E. Y. Foley entered into an agreement to create a trust fund for the purpose, among others, of liquidating "pressing claims and paying such pressing debts as could not be deferred."

White v. Wilson, 9 Fed. 2d 650, 9 Fed.

The decree of this court in deciding the issues presented in the main case reads in part as follows:

> "And all thereof is a trust fund, created under a trust agreement of January 26, 1923, under a creditors' contract of February 19, 1923, and March 14, 1923, for the ratable and proportionate benefit of the creditors of E. Y. Foley * * *.
>
> "That on September 13, 1923, said creditors became creditors of the bankrupt estate of E. Y. Foley and E. Y. Foley, Inc. * * *.
>
> "That $69,445.35 is and on September 13, 1923, was impressed with a definite and specific trust for the benefit of the creditors, etc.
>
> "That said $57,988.41 in said special account A is the remainder of a special trust fund of $200,000.00 advanced primarily for the benefit of the grower creditors of E. Y. Foley by certain con-

> tributors under said trust agreement of January 26, 1923, and under creditors' contracts of Feb. 19, 1923, and March 14, 1923. That on September 13, 1923, the said $57,988.41 was impressed with such definite and specific trust and belonged to said contributors proportionately, subject to the payment of two checks, etc. * * *." [Tr., Vol. 1, p. 283.]

Obviously in the case at bar, the money was a trust fund deposited in part for the benefit of the petitioners. The contributors created the fund for the benefit of certain persons, firms or corporations who *were pressing creditors of E. Y. Foley, whose debts could not be deferred* and designated E. Y. Foley, Inc., their trustee to decide the person, firm or corporation who came within the conditions named and to pay them the amount which it was determined they were entitled to. The fund was placed on deposit with the defendant bank and called "Special Account A."

Under the authority vested in them, the trustees designated the petitioners' pressing creditors whose debts or claims could not be deferred and entered into an agreement to pay the petitioners $21,500.00 from said fund, petitioners to satisfy the judgments held by them to the extent of $21,500.00 and the balance of the judgments when certain stock was delivered to the petitioners.

On August 3, 1923, when the petitioners entered into the agreement with E. Y. Foley, Inc., as trustee, wherein the E. Y. Foley, Inc., executed the equitable assignment, the trust agreement for the benefit of the petitioners had been executed and was in full force and effect, and it is quite probably and susceptible of proof that most, if not all of the fund, was on August 3rd,

1923, in the possession of the trustee of the fund, the trustee thereof probably postponed the deposit of the fund until they were in receipt of the entire fund, namely, August 7th, 1923.

True on August 3rd, 1923, the fund had not been deposited in the bank under the designation of Special Fund A, but the fund was identified at the time that the petitioners accepted the note as evidence of the indebtedness payable thirty days thereafter, and there was a distinct and express promise to pay the $21,500.00 out of the trust fund contributed by the contributors for the petitioners' benefit. The fact that it was not called by that name, or that it was not deposited at that time is immaterial so long as the fund out of which the money was to be paid was known and could be identified.

In effect, the trustees said to the petitioners: "Certain eastern and western creditors of E. Y. Foley have contributed to a trust fund of $200,000.00 to pay you and other creditors in the same position, the indebtedness due from E. Y. Foley. Most of the money is here and the rest is on the way and will be here before September 3rd, 1923. The contract creating the trust fund for your benefit has been signed by all concerned. We are going to deposit it in a bank and will assign to you $21,500.00, out of it upon condition that you do certain things. We haven't the money now; we will pay it within the next thirty days and give you a note for that amount as evidence of our good faith," and the petitioners assented.

The essential thing was a designation of the trustee as agent of the contributors of a fund raised for the petitioners' benefit.

Of course the designation of the trustees operated at once as an equitable assignment of the fund *pro tanto*. The trustees could not withdraw their designation; could not legally control or dominate the part of the fund assigned. Their designation resulted in an irrevocable appropriation of the fund *pro tanto* in favor of the petitioners. In fact, they never made any attempt to revoke the designation.

In the case of:

Barnes v. Alexander, 232 U. S. 117,

the syllabus is as follows:

> "In equity a contract to convey a specific object, even before it is acquired, will make a contractor a trustee as soon as he gets the title thereto.
>
> An obligation to pay, definitely limited to payment out of the fund, creates a lien. There should be but one rule in this respect and that is suggested by plaintiff's good sense.
>
> Where parties have a lien upon a fund, they can follow it, as soon as identified, into the hands of others than the person originally receiving it."

Mr. Justice Holmes who delivered the opinion of the court says in part:

> "The proceeding out of which this case arises was brought by the appellant, Mrs. Barnes, for an account of the property received in settlement of certain mining suits and for a recovery of one-fourth of the same. The defendants, Shattuck, Hanninger and Marks were parties to these suits and employed as their attorneys the firm of Barnes

& Martin and one O'Connell under an agreement that the lawyers should have as their compensation one-fourth of all that was received by the defendants. * * *.

While the present suit was pending another firm, whose claim is now represented by the appellees, intervened and claimed one-third of this contingent fee of one-fourth. * * *.

The main question is whether the facts set forth in the findings certified justify the conclusion of the courts below. The whole matter rests upon conversations, in one of which Barnes said to Street and Alexander: 'If you will attend to this case, I will give you one-third of the fee which I have coming to me on a contingent from Shattuck, Hanninger and Marks. Mr. O'Connell who is associated with me is entitled to the other-one-third'.

In the others also he explained that his firm was to have, and told Street and Alexander that they should get one-third of that if they would do certain work that he had not time to attend to, Street and Alexander did the work required, it does not matter whether it was more or less. * * *.

The only serious argument is that, whatever they did, their compensation depended upon a personal promise that gives them no specific claim against the fund. For this proposition reliance is placed upon Trist v. Child, 21 Wall. 441. * * *.

This decision, so far as it concerns us here, seems to have overlooked Wylie v. Coxe, 15 How. 415, which decided that a contract for a contingent fee out of a fund awarded constituted a lien upon the fund. * * *.

We start, however, with the principle that an informal business transaction should be construed as adopting whatever form consistent with the facts is most fitted to reach the result seemingly desired. Sexton v. Kessler & Co., 225 U. S. 90, 96.

Obviously the only thing intended or desired was to give the appellees a claim to one-third of the

fund received by Barnes if and when he should receive it. It is true that there was in a sense a *res* as to which present words of transfer might have been used. There was a right vested in Barnes, unless discharged, to try to earn a fee contingent upon success. But in a speculation of this sort the parties naturally turned their eyes toward the future and aimed at the fruits when they should be gained. They therefore used words of contract rather than of conveyance; but the important thing is not whether they used the present or the future tense, but the scope of the contract. In this case it aimed only at the fund. Barnes gave no general promise of reward; he did not even give a promise qualified and measured by success to pay anything out of his own property, referring to the fund simply as the means that would enable him to do it. See National City Bank v. Hotchkiss, 231 U. S. 50.

He promised only that if, when, and as soon as he should receive an identified fund, one-third of it should go to the appellees. But he promised that.

At the latest, the moment that the fund was received the contract attached to it as is made at that moment. It is an ancient principle even of the common law that words of covenant may be construed as a grant when they concern a present right. * * *. And it is one of the familiar rules of equity that a contract to convey a specific object even before it is acquired will make the contractor a trustee as soon as he gets a title to the thing. * * *.

The obligations of Barnes was as definitely limited to the payment out of the fund as if the limitation had been stated in words, and therefore creates a lien upon the principle not only of Wiley v. Coxe, *supra*. * * *.

After making their contracts the parties seem to have construed them as we have done. Barnes wrote to his partner; when they had succeeded in the cases concerned, in terms showing that he re-

garded their own claim as specific, 'to have one-fourth of the ground' the principle on which this suit was brought; and when a settlement was to be made he went to Phoenix and notified Street and Alexander. * * *.

It is not necessary to consider whether the lien attached to what we have called the *res,* before the fund was received, as a covenant to set apart rents and profits creates a lien upon the land. * * *.

It is enough that it attached not later than that moment. We have considered the case upon the merits. The argument upon them for the appellants is mixed with others as to the sufficiency of the complaint in intervention. Upon the point of pleading we see no occasion to go behind the decision below.

Another matter argued is that the appellants should not have been allowed to prove the payment made after the suit was begun. But the appellees properly were allowed to intervene in a suit to recover the fund. (Citing statute and cases.)

Even if their lien was only inchoate when the suit was begun (which we do not intimate), they had a right to protect their interest, and of course were not deprived of it by the plaintiffs reaching the result that they also desired. Having a lien upon the fund, as soon as it was identified they could follow it into the hands of the appellant Barnes."

Authorities could be multiplied.

The allegations in the complaint in intervention of C. H. Wilson differs only from those of the appellants in that it is there alleged that the plaintiff received a check drawn on the fund Special Account "A", the rest of the complaint of the appellants to a large extent is identical with that of Wilson. Paragraphs 2, 3, 4, 5 and 9 of the Wilson complaint will be found identical with paragraphs 3, 11, 13 and 14, respectively of the complaint herein.

The Learned District Court because of the issuance of a check to C. H. Wilson, differentiates it from the case at bar. While evidence of the issuance of a check upon the fund may be very persuasive of the execution of an equitable assignment, it is to be doubted that it constitutes an equitable assignment. A check is neither a legal nor an equitable assignment; it is merely a request to pay a certain sum and charge the account of the drawer. Therefore the issuance of the check without more is not an equitable assignment.

5 *Corpus Juris,* 920;
Fourth State National Bank v. Yardley, 165 U. S. 634;
Laclede Bank v. Schuler, 120 U. S. 511;
Washington First National Bank v. Whitman, 94 U. S. 343.

The Learned District Court we believe erred in stating that it was primarily for the purpose of liquidating grower claims that such fund was created, the trustee agreement hereinbefore referred to provides that the trust was for the purpose of paying "pressing debts, the payment of which could not be deferred." It is also apparent that once the fund is distributed appellants will be *foreclosed* from ever obtaining the fund assigned to them. No action lies against the trustee of the bankrupt estate. The fund never has been in his possession as trustee of the bankrupt estate. The defendant bank is a mere depository and if by order of court the funds are withdrawn it is questionable whether the bank would be any longer liable or responsible.

E. Y. Foley is insolvent, E. Y. Foley, Inc., is insolvent. If the fund is held by the E. Y. Foley, Inc., or its di-

rectors as trustee or trustees of the fund as the case may be and is distributed to the original creators of the trust it will result in closing the trust. It would seem that appellants would then be without redress, however, even were it considered that the appellants might look to the trustee of E. Y. Foley. Inc., for its claim, that estate being insolvent and having paid back the fund and terminated the trust, the appellants would be helpless. Therefore, unless the appellants are granted intervention in the pending cause they can never obtain relief. Their right to intervene, therefore are absolute and not discretionary. The appellants' claim is a lien upon specific property in the exclusive jurisdiction of the U. S. District Court the fund is subject to the exclusive jurisdiction of that court and appellants' interest can be established, preserved and enforced in no other way than by determination and action of that court, assuming for the sake of argument that the granting of permission that was discretionary with the Learned District Court that discretion surely is not an arbitrary one. A legal discretion was to be exercised, IF, HOWEVER, IT BE ADMITTED.

That after the distribution of the fund and the closing of the trust estate by the court, the appellants by some procedure involving a multiplicity of suits in different jurisdictions against the distributees of the fund will be able to obtain some relief—the Learned Court nevertheless erred in forcing such a course upon the appellants. The expense for attorneys' fees, depositions, witnesses' fees and court costs, etc., in a series of actions and proceedings would seem to be prohibitive, a burden

too great for appellants to carry, hence the ruling amounts to a denial of the trial of the issues.

Discretion is defined as legal discretion in contradistinction with personal discretion. In the exercise of discretion the court may not act arbitrarily, inconsiderately or unreasonably.

18 *Corpus Juris* 1136;
Styria v. Morgan, 186 U. S. 1;
Hennessy v. Carmody, 25 Atl. Reporter 374;
Osborn v. U. S. Bank, 9 Wheaton 738.

In the last case Marshall, chief justice, said:

> "Courts are mere instruments of the law and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law, and when that is discerned it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature, or, in other words, to the will of the law."

POINT II.

Failure of the Appellants to Interpose an Objection to a Stipulation Excluding Them From Participating in the Fund Was Not a Waiver of Their Rights.

Some kind of a meeting was called before the referee; just what was the character of the notice or what was the purpose of the meeting, does not appear, except that it was a meeting of creditors. At that meeting held in Fresno on November 29, 1923, a proposed stipulation, trust agreement and proposed decree was presented. The stipulation, agreement and decree adjusted the issues in the major case and provided for the distribution of

the trust fund, to the exclusion of the appellants. It was stated in open court that no objection was made by any person to the stipulation, agreement or decree, however neither the stipulation nor agreement was signed by the appellants or their counsel, nor was the decree nor stipulation nor covenant consented to. [Tr. p. 39.]

On December 3, 1927, the agreement, stipulation and proposed decree was presented to the Learned District Court for approval at which time counsel for the appellants appeared, and objected to the entry of the decree. The court, at the request of counsel for the trustee in bankruptcy, called witnesses who testified that no objection was interposed at the meeting held before the referee.

The Learned Court ruled that the appellants by not specifically objecting to the stipulation, agreement and decree at the meeting before the referee, was without right to object before the court. Notwithstanding, neither appellant nor their counsel appended their names to any instrument or paper. The appellants as was their right, assumed that having adopted the course provided by law they were not obliged to keep repeating their position and raising objections to the distribution of the trust fund unless they receive their share. The appellants had filed an application for permission to intervene and until they had withdrawn that application or the time to appeal from the adverse ruling had expired, they were within their rights in assuming that the application was pending and that there was no occasion to speak other than through the channels of the proceeding instituted by them for that purpose.

They had a right to assume that but one proceeding was necessary to indicate their wishes in the matter.

Moreover, undoubtedly the appellants were quite well aware that the parties adverse to them would not be pursuaded by their voice, that, repetition was not argument.

That the appellants' stand was shown, assuming that it was necessary to show their stand by their declination to sign stipulation or agreement, and although upon the submission of the instruments to the Learned District Court, appellants through their counsel appeared and interposed objections it was not because it was deemed essential to sustain their previous application to intervene but to prevent the distribution of the fund, so appellants might not be denied the security of their lien their equitable assignment.

The Learned District Court refused to recognize counsel for appellants, as regularly appearing herein upon the coming on of the hearing for the settlement of the decree.

Appellants were therefore not represented upon the hearing of the settlement of the decree hence could not present appellant's cause.

If appellants are correct in assuming that their conduct before the referee did not foreclose them from proceeding with their application for permission to intervene, they were very seriously prejudiced by the ruling of the Learned District Court in that the decree distributed the entire fund and unless that decree is modified or an order of restitution made *pro tanto*, appellants will have lost their rights.

POINT THREE.

An Appeal Lies Herein.

See

Marvin v. Lalley, 17 Wall, 14;
Harry Bros. v. Yaryan, 219 Fed. 834;
Kathey v. Brooks, 193 Fed. 973.

(1) The right to intervene in a federal action is governed by *Federal Equity Rule* 37.

> "* * * Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

(2) There are two classes of interventions, (a) Discretionary, and (b) As of Right.

United States Trust Co. v. Chicago Terminal T. R. Co., 188 Fed. 292, 296.

> "Applications for leave to intervene are of two kinds. In one the applicant has other means of redress open to him, and it is within the court's discretion to refuse to incumber the main case with collateral inquiries. In the other the applicant's claim of right is such that he can never obtain relief unless it be granted him on intervention in the pending cause. In this latter class the right to intervene is absolute and the rejection of the petition is a final adjudication and therefore appealable. Credits Commutation Co. v. United States, 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782; Minot v. Mastin, 95 Fed. 734, 38 C. C. A. 234; United States v. Philips, 107 Fed. 824, 46 C. C. A. 660; *In re* Columbia Real Estate Co., 112 Fed. 643, 50 C. C. A. 406; Thomasson v. Guaranty Trust Co., 159 Fed. 126, 86, C. C. A. 514."

(3) A person claiming the right to share in a fund in court is usually allowed to intervene. Thus, intervention was allowed to permit a construction of a deed of trust.

Central Trust Co. v. Marietta R. Co., 63 Fed. 492.

(4) One having an intent in specific property, the subject of litigation in court which has exclusive control thereof, has the absolute right to intervene. Thus in

Western Union Tel. Co. v. U. S. & M. T. Co., 221, Fed. 545, 552:

"Moreover, there is a class of cases in which a party has the equitable right to intervene, and the right to review by appeal any order denying that right, and this case is of that class. The class included these cases in which one claims a lien upon or an interest in specific property in the exclusive jurisdiction and subject to the exclusive disposition of a court, and his interest therein can be established, preserved, or enforced in no other way than by the determination and action of that court. Credits Commutation Co. v. United States, 177, U. S. 311, 317, 20 Sup. Ct. 636, 44 L. Ed. 782; Credits Commutation Co. v. United States, 91 Fed. 570, 573, 34 C. C. A. 12; United States Trust Co. v. Chicago Terminal Transfer R. R. Co., 188 Fed. 292, 110 C. C. A. 270; Minot v. Mastin, 95 Fed. 734, 739, 37 C. C. A. 234, 239; United States v. Philips, 107 Fed. 824, 46 C. C. A. 660. Such a party has an absolute right to intervene in the proceeding in which the court holds the exclusive custody and dominion of the property and to review by appeal an order refusing that right. By the same mark an order striking out the petition of such a party, or striking out the statement of his cause of action for a lien upon or interest in the property, and the facts entitling him to its preservation or enforcement, is receivable and reversible. The telegraph company alleged facts in its petition

showing itself to be one of the *cestui que* trust for whom the property of the railway company, which was in the exclusive jurisdiction and subject to the exclusive jurisdiction and subject to the exclusive disposition of the court below, was held by it, and that there was imminent danger that its interest in or lien upon it would be lost, unless established, preserved, and enforced by that court. On the statement in its petition it had the right to intervene, an order denying its leave to do so would have been receivable and reversible, and the order striking from its petition its statement of its trust relation, its interest in or lien upon the property, and the grounds for the relief it sought is equally so."

Credits Commutation Co. v. United States, 177 U. S. 311, 315:

"It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled, on which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief. * * *."

Rhinehart v. Victor Talking Machine Co., 261 Fed. 646, 651:

"The contention that the intervenor should not be permitted to intervene, because he has an adequate remedy at law against the plaintiff, is without merit. If he has such a remedy, he is not, I think, necessarily confined to it, in a case such as this. Wylie v. Coxe, 15 How. 415, 419, 14 L. Ed. 753;

Haines v. Buckeye Wheel Co., 224 Fed. 289, 297, 139 C. C. A. 525; Bowen v. Needles National Bank (C. C.) 76 Fed. 176. See, also, cases cited in 14 Stand. Encyc. Proceed. pp. 312, 313. Under the Supreme Court rules the right to intervene seems absolute, subject only to the discretion of the court to which the application is addressed."

Minot v. Martin, 95 Fed. 734, 739:

"* * * It may be conceded that when, in a pending case, a receiver is appointed to take possession of property, the court or chancellor by whom the appointment is made is not always bound to permit a third party to file an intervening petition, and become a party to the case, because he asserts some interest in the pending controversy or in the property which is hereby affected. It may be that the interest asserted by the intervener will be wholly unaffected by the proceedings which are liable to be taken in the pending case or that his rights, whatever they may be, are subordinate to the rights of the parties thereto; or that he is already well represented in the principal case; or that there are other adequate remedies within his reach, and at his disposal, which render it unnecessary to burden the case with the collateral issue which is tendered by the intervener. In cases of the latter sort it is usually held to be discretionary with the court or chancellor to whom an application to intervene is addressed to allow or reject the intervention, and leave to intervene should be obtained. Credits Commutation Co. v. U. S. 62, U. S. App. 728, 34 C. C. A. 12, and 91 Fed. 570; Hamlin v. Trust Co., 47 U. S. App. 422, 427, 24 C. C. A. 271, and 78 Fed. 664; *In re* Streett, 8 U. S. App. 645, 648, 10 C. C. A. 446, and 62 Fed. 218; Jones & Laughlins v. Sands, 51 U. S. App. 153, 25 C. C. A. 233, and 79 Fed. 913; *Ex parte* Cutting, 94 U. S. 14. There are other cases however, where the right of a third party to intervene in a pending case is *si impreative* resting, as it does, on ground of necessity, and the inability of the party to obtain

relief of other means, that the right cannot be said to be dependent upon judicial discretion. For example, a court cannot lawfully refuse to permit an intervening petition to be filed when the petitioner shows a title to or a lien upon property in the custody of a receiver, and a present right to its possession, which is superior to any right or title that is or may be asserted by the parties to the suit in which the intervention is filed, and at whose instance a receiver was obtained. The case at bar falls within the class of cases last described. The plaintiffs showed by their intervening petition that they were trustees in a deed of trust or mortgage which was executed by John J. Mastin and his wife, Julia Mastin, in the lifetime of the former; that the mortgage debt thereby secured was overdue and unpaid, and that under the provisions of the deed of trust they had a paramount lien on the mortgaged property, and a right to the immediate possession thereof, inasmuch as it was only held in judicial custody at the instance and request of the members of the firm of John J. Mastin & Co. for the purpose of aiding in the adjustment of the unsettled affairs of that co-partnership. We entertain no doubt, therefore, that the plaintiffs had a right to file an intervening complaint in the case of Mastin against Mastin, which was not dependent upon the exercise of any discretionary power vested in the trial court; and, having such right, we are furthermore of opinion that the mere lodgment of the complaint in the clerk's office without precedent leave of court was not sufficient cause for sustaining the demurrer thereto."

Where a denial of the right to intervene is a practical denial of all relief to the petitioner, who has no other means of redress, an appeal will lie from an order denying intervention.

Credit Commutation Co. v. U. S. 91 Fed. 570, 573, 177 U. S. 311.

But otherwise, such an order is NON-APPEALABLE.

Ex parte Cutting, 94 U. S. 14;
Jones v. Sands, 79 Fed. 913;
Credits Commu. Co. v. U. S. Supra.

However, the proper practice is for the District Court to grant an appeal in every case, leaving the question of the appealability of the order for the decision of the court of review.

U. S. v. Phillips, 107 Fed. 824.

And, where there is a fund in court in the course of administration, which will be distributed to others unless the intervenor's claim is forthwith determined, the order denying intervention is appealable.

Western Union Tel. Co. v. U. S. & Mex. Tr. Co., 221 Fed. 545.

The order should be reversed.

Respectfully submitted,

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